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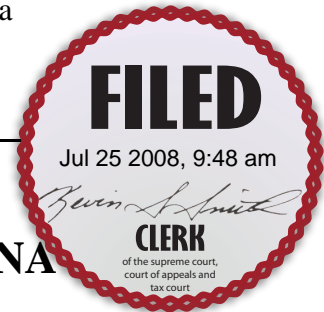
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**IN THE
COURT OF APPEALS OF INDIANA**



MARK DOUGLAS,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A05-0712-CR-734

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark D. Stoner, Judge
The Honorable Jeffrey Marchal, Commissioner
Cause No. 49G06-0612-FC-230385

July 25, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Mark Douglas appeals his seven-year sentence imposed following his conviction for class C felony carrying a handgun without a license. We affirm.

Issues

We restate the issues as follows:

- I. Whether the trial court erred in granting Douglas's petition for permission to file a belated notice of appeal;
- II. Whether the trial court abused its discretion in failing to consider Douglas's mental capacity as a mitigator; and
- III. Whether Douglas's sentence is inappropriate in light of the nature of the offense and his character.

Facts and Procedural History

The facts most favorable to Douglas's conviction indicate that on December 3, 2006, Indianapolis Police Officer Daryl Patton observed Douglas at a gas station with his vehicle. Believing that there was an outstanding warrant for his arrest, Officer Patton, along with Officer Michael Bragg, arrested Douglas. Officer Patton looked into Douglas's vehicle and observed the butt of a handgun wedged between the center console and the driver's seat. Officer Patton then retrieved the handgun.

The State charged Douglas with class A misdemeanor carrying a handgun without a license and a class C felony enhancement based on a prior conviction for carrying a handgun without a license. On October 3, 2007, a jury found Douglas guilty of the class A misdemeanor. Douglas waived his right to a jury trial on the class C felony enhancement. On October 4, 2007, the trial court found that Douglas had a prior conviction for carrying a

handgun without a license and subsequently found him guilty of the class C felony enhancement. The trial court conducted a sentencing hearing on October 11, 2007, and imposed a sentence of seven years executed. On November 30, 2007, Douglas, pro se, filed an untimely notice of appeal. On December 11, 2007, Douglas, by counsel, filed a petition for permission to file a belated notice of appeal. On December 31, 2007, the trial court granted Douglas permission to file a belated notice of appeal. This appeal ensued.

Discussion and Decision

I. Belated Notice of Appeal

Indiana Post-Conviction Rule 2 provides that a petition for permission to file a belated notice of appeal may be filed with the trial court where the failure to file a timely notice of appeal was not due to the fault of the defendant, and the defendant has been diligent in requesting permission to file a belated notice of appeal. A trial court's ruling on a petition pursuant to Post-Conviction Rule 2 should be affirmed unless it was based on an error of law or a clearly erroneous factual determination. *Bosley v. State*, 871 N.E.2d 999, 1002 (Ind. Ct. App. 2007).

The burden is upon the defendant to prove by a preponderance of the evidence that he was without fault in the delay of filing and was diligent in pursuing permission to file a belated appeal. *Moshenek v. State*, 868 N.E.2d 419, 422-23 (Ind. 2007). In general, the determination of whether a defendant is responsible for the delay is a matter within the trial court's discretion, to which we defer. *Baysinger v. State*, 835 N.E.2d 223, 224 (Ind. Ct. App. 2005).

The State contends that the trial court erred in granting Douglas's petition for

permission to file a belated notice of appeal, claiming that Douglas failed to show by a preponderance of the evidence that he was without fault for the delay in filing. While we acknowledge the State's contention, we prefer to address the merits of Douglas's appeal.

II. Abuse of Discretion

Douglas first contends that the trial court erred by failing to consider his diminished mental capacity as a mitigating factor. So long as it is within the statutory range, a sentencing decision is subject to review on appeal for an abuse of discretion. *Anglemyer v State*, 868 N.E.2d 482, 492 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. An abuse of discretion occurs if the decision is "clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." *Id.* (citations and quotation marks omitted). At the outset, we note that Douglas failed to advance his diminished mental capacity as a mitigating factor to be considered by the trial court at sentencing. As our supreme court has stated, "the trial court does not abuse its discretion in failing to consider a mitigating factor that was not raised at sentencing." *Id.* Therefore, Douglas has effectively waived his claim. Waiver notwithstanding, we address the merits of his claim.

The trial court need only identify mitigating circumstances that it finds to be significant, and if the trial court does not find the existence of a mitigating factor after it has been argued by counsel, the trial court is not obligated to explain why it has found that the factor does not exist. *Id.* at 493. "On appeal, the defendant must show that the proffered mitigating circumstance is both significant and clearly supported by the record." *Felder v. State*, 870 N.E.2d 554, 558 (Ind. Ct. App. 2007).

Factors that bear on the mitigating weight to be afforded a mental illness include: “(1) the extent of the defendant’s inability to control his or her behavior due to the disorder or impairment; (2) overall limitations on functioning; (3) the duration of the mental illness; and (4) the extent of any nexus between the disorder or impairment and the commission of the crime.” *Williams v. State*, 840 N.E.2d 433, 439 (Ind. Ct. App. 2006). Here, although the pre-sentence investigation report indicates that Douglas began attending special education classes in the sixth grade and has an IQ of 74, Douglas has failed to establish that he was unable to control his behavior, that there were limitations on his ability to function, or that there was a nexus between his mental condition and the crime. In light of these facts, we cannot find that the trial court abused its discretion in not finding his mental capacity as a mitigating circumstance.

III. Appropriateness of Sentence

Douglas maintains that his seven-year sentence is inappropriate. Pursuant to Indiana Appellate Rule 7(B), this Court may “revise a sentence authorized by statute if after due consideration of the trial court’s decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” A defendant must persuade the appellate court that his sentence has met the inappropriateness standard of review. *Anglemyer*, 868 N.E.2d at 494.

Douglas contends that the nature of the offense was not particularly extraordinary. While we agree that the nature of the offense may not be particularly egregious standing alone, Douglas’s criminal history, which spans over three decades, does not reflect favorably on his character. Douglas has eight prior convictions, four of which are felonies involving

possession of cocaine, auto theft, and carrying a handgun without a license. In light of these facts, Douglas has failed to persuade us that his seven-year sentence for class C felony carrying a handgun without a license is inappropriate.

Affirmed.

KIRSCH, J., and VAIDIK, J., concur.